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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PARKS,

Defendant and Appellant.

B177405

(Los Angeles County  
Super. Ct. No. PA037276)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Charles L. Peven, Judge. Affirmed.

Jonathan B. Steiner and Richard L. Fitzer, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and  
Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Michael Parks, appeals following his no contest plea to assault by means likely to produce great bodily injury and an ensuing order finding him in violation of a grant of probation. (Pen. Code,<sup>1</sup> § 245, subd. (a)(1).) Defendant's sole argument on appeal is that the trial court improperly imposed the upper term without affording him a jury trial on the aggravating factors. We affirm.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On the first day of his employment with a moving company, defendant punched a supervisor, Enrique Hernandez, in the face. Mr. Hernandez had instructed defendant to utilize some equipment in moving a table. Defendant broke Mr. Hernandez's eyeglasses, nose, and eye socket. Mr. Hernandez had surgery on his nose and suffered recurring pain under his left eye. Mr. Hernandez also missed eight weeks of work. Defendant pled guilty to the charge of assault by means likely to cause great bodily injury. Defendant was ordered to serve 365 days in county jail and was placed on formal probation for 3 years. Defendant's probation was subsequently revoked following his arrest on charges that following a traffic collision, he chased two individuals, and threatened them with a handgun. Defendant was in possession of semi-automatic handgun and marijuana at the time of his arrest.

Citing *Blakely v. Washington* (2004) 542 U.S. \_\_\_, \_\_\_ [124 S.Ct. 2531, 2537-2539, 2543] and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, defendant argues he was entitled to a jury trial on the aggravating factors relied upon by the trial court in imposing the upper term. The Attorney General argues this issue has been forfeited because it was not raised in the trial court. We agree. (*United States v. Booker* (2005) 543 U.S. \_\_\_, \_\_\_ [2005 WL 50108]; *United States v. Cotton* (2002) 535 U.S. 625, 628-634.)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

In any event, there is no possibility of a different result had the matter been submitted to a jury. Upper term treatment was a foreordained reality. In the face of federal constitutional error of the type potentially at issue here, we apply the *Chapman v. California* (1967) 386 U.S. 18, 22 harmless error test. (*United States v. Booker, supra*, 543 U.S. at p. \_\_\_\_; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079-1080, fn. 9.) Here, there were no mitigating factors. The trial court relied in part on defendant's prior convictions, which is not subject to the federal constitutional jury right. (*Blakely v. Washington, supra*, 542 U.S. at p. \_\_ [124 S.Ct. at p. 2536]; *Apprendi v. New Jersey, supra*, 530 U.S. at p. 490.) In the absence of any mitigating circumstances, the trial court was virtually required to impose the upper term. (See Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation"]; *People v. Osband, supra*, 13 Cal.4th at pp. 728-729; *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1263-1264; *People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) At the time defendant was sentenced, the trial court noted: "The court finds that there are no . . . mitigating factors in this matter. There are several aggravating factors in that the defendant has numerous prior convictions, and these convictions are numerous and of increasing seriousness; he has served prior prison terms; he was on parole at the time that he committed the crime for which he's now on probation; his prior performances on probation and parole were unsatisfactory, because the court notes that he was placed on probation, on several occasions violated probation, and sent to prison, and that he had violated his parole on several occasions. [¶] So, therefore, the court is going to select the high term in this matter, that being four years."

As a juvenile, defendant was arrested for burglary, grand theft, and assault with a firearm. (§§ 245, subd. (a)(2), 459, 487.) On December 2, 1985, defendant was committed to the California Youth Authority for robbery. (§ 211.) In 1988, defendant violated his parole by possessing a controlled substance for sale. (Health & Saf. Code,

§ 11351, subd. (a).) On June 7, 1990, defendant was convicted of possession of a controlled substance for purpose of sale. He was sentenced to three years in state prison. In 1992, he was returned to state prison on a parole violation for assault by means likely to cause great bodily injury. On August 9, 1994, defendant was again sentenced to state prison for 28 months following his conviction for possession of cocaine base for purposes of sale. (Heath & Saf. Code, § 11351.5, subd. (a).) On December 8, 1995, defendant was sentenced to 16 months in state prison for possession of a firearm by a felon. (§ 12021, subd. (a).) In 1996, defendant was sentenced to two years confinement in Nebraska for possession of marijuana with the intent to sell. Defendant was also arrested in Chicago, Illinois for aggravated assault and battery on August 25, 1999, and possession of a controlled substance, domestic battery, and aggravated assault on September 11, 1999. Defendant was on parole when he committed the underlying assault in this case. Since the upper term was effectively required under these circumstances, any *Blakely* error was harmless. (*United States v. Booker*, *supra*, 543 U.S. at p. \_\_\_\_; *Chapman v. California*, *supra*, 386 U.S. at p. 22.)

The judgment is affirmed.

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TURNER, P.J.

I concur:

KRIEGLER, J.\*

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\* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.

MOSK, J., Concurring.

I concur in the judgment. I do not agree that there was any forfeiture of the *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531] issue. (*People v. Ackerman* (2004) 124 Cal.App.4th 184, 192-195.)

MOSK, J.